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# In the Supreme Court of the United States

OCTOBER TERM, 1962

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No. 917

FRANK STRÁNGWAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 11-18) is reported at 312 F. 2d 283.

### JURISDICTION

The judgment of the court of appeals was entered on January 8, 1963. (Pet. 18.) Petition for rehearing was denied on February 12, 1963. The petition for certiorari was filed on March 11, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to review the sufficiency of the evidence to support the verdict because petitioner designated only a portion of the evidence adduced at trial to be included in the record on appeal.

2. Whether, when petitioner did not request the trial court to instruct the jury with reference to the uncorroborated testimony of an accomplice, and offered no objection to the trial court's failure to give a certain requested charge on circumstantial evidence, it was error for the court of appeals to refuse to consider the merits of petitioner's argument that these charges should have been given.

3. Whether, after the jury was unable to reach a verdict, petitioner was prejudiced by the trial court's instruction to the jury that it should consider in its deliberations the cost of the trial to both sides and the future cost in the event of a new trial.

## STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 7206. FRAUD AND FALSE STATEMENTS.

Any person who—

* * * *

(2) *Aid or assistance.*—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material

> matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; * * *
>
> * * * *
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.
>
> (26 U.S.C. 1958 ed., Sec. 7206(2).)

## STATEMENT

On November 8, 1961, a twelve count indictment was filed against petitioner in the United States District Court for the Southern District of California, charging that he had violated Section 7206(2) of the Internal Revenue Code of 1954. The indictment alleged that petitioner had wilfully counseled, procured and advised the preparation and presentation of fraudulent income tax returns for the year 1958 for the individuals named in each count of the indictment. (C.T. 2-13.)[1] After a jury trial, petitioner was found guilty as to count five of the indictment, which charged that he had prepared a false 1958 income tax return for one Ramona E. Rodriguez. (C.T. 6).[2] Petitioner was sentenced to a term of

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[1] C.T. refers to Clerk's Transcript of Proceedings in the District Court. R.T. refers to Reporter's Transcript of the trial.

[2] The jury returned a verdict of not guilty as to Counts Six and Twelve of the indictment, and were unable to agree upon a verdict as to the remaining nine counts. (C.T. 69.)

three years and a fine of $5,000 (C.T. 75). After suspending the prison sentence, the district court placed petitioner on probation for a period of five years on condition that the $5,000 fine be paid in full at a rate of not less than $100 per month. (C.T. 75.) The court of appeals unanimously affirmed the judgment of conviction. (Pet. 11-18.)

As noted by the court of appeals, petitioner "designated only a portion of the evidence for inclusion in the record on appeal" (Pet. 12), and for this reason the court declined to pass upon the sufficiency of the evidence to support the verdict. (Pet. 12). Broadly speaking, however, the evidence showed that petitioner, who described himself as a "tax consultant" and "tax specialist" (R. T. 228, 350, Govt. Ex. 93), prepared the 1958 income tax return of Ramona E. Rodriguez (R. T. 28, Govt. Ex. 5); that, contrary to the information furnished him by Mrs. Rodriguez, petitioner claimed deductions for certain non-existent medical expenses, amounting to $120. (R.T. 32-38; 163-164); that, though Mrs. Rodriguez informed petitioner she did not own an automobile (R.T. 43), petitioner claimed deductions amounting to $54 for an auto license and for the State gas tax (R.T. 163; Ex. 5); that petitioner claimed a "Child care" deduction of $600 for Mrs. Rodriguez (Ex. 5) when in fact no such expenses were incurred (R.T. 45, 165); and that petitioner, disregarding the information received by Mrs. Rodriguez concerning her deceased uncle (R.T. 50-51), claimed a false exemption for the latter on the 1958 return. (Ex. 5)

## ARGUMENT

1. There is no merit to petitioner's contention (Pet. 6-8) that the court of appeals erred when it declined to pass upon the sufficiency of the evidence to support the verdict. Petitioner filed only a partial transcript of the testimony, and, as noted by the court of appeals (Pet. 13), where "only a partial transcript of the evidence is included in the record on appeal, the sufficiency of the evidence cannot be evaluated. *Donaldson* v. *United States*, 9 Cir. 248 F. 2d 364, 367." This is especially true in the instant case, where petitioner neither filed a reply brief nor offered oral argument (Pet. 12, fn. 2) to controvert the government's assertion below that the incomplete record afforded an inadequate basis for appellate review of the evidence.

2. Petitioner contends (Pet. 8) that the court of appeals erred when it refused to consider the merits of his assertion that the trial court should have instructed the jury that if the evidence is susceptible of two reasonable interpretations, one of which points to guilty, and the other to innocence, the jury must adopt that interpretation which points to innocence. We submit, on the contrary, that since petitioner did not object in the trial court to the failure to give this instruction—as required under Rule 30 of the Federal Rules of Criminal Procedure—nor even argue the point in his court of appeals brief, it was entirely proper for the court of appeals to decline to consider the merits of the contention.

3. Nor is there any substance to petitioner's argument (Pet. 9) that the court of appeals erred in de-

clining to rule upon the merits of his claim that the trial court should have instructed the jury on the evaluation of the testimony of an accomplice. Aside from the fact that petitioner offers no argument and cites no support in the record for his conclusion that Mrs. Rodriguez "was an accomplice as a matter of law" (Pet. 9), it is clear that petitioner waived any objection on this point by failing to request such an instruction in the district court. (C.T. 43-59, 64-65)

4. Finally, petitioner contends that the court of appeals erred in approving the trial court's supplemental instruction (R.T. 419-420), quoted in footnote three of the court's opinion (Pet. 15). This charge, though somewhat different in content, was addressed to the same problem of jury stalemate which prompted the instruction approved by this Court in *Allen* v. *United States*, 164 U.S. 492, 501, and subsequently by many courts of appeals. See, *e.g.*, *Andrews* v. *United States*, 309 F. 2d 127 (C.A. 5), certiorari denied, March 18, 1963; *Hagans* v. *United States*, 261 F. 2d 924, 927 (C.A. 5), certiorari denied, 359 U.S. 967; *United States* v. *Curcio*, 279 F. 2d 681, 682 (C.A. 2), certiorari denied, 364 U.S. 824; *Anderson* v. *United States*, 262 F. 2d 764, 773 (C.A. 8), certiorari denied, 360 U.S. 929. An instruction virtually identical to the one here was sustained by the Ninth Circuit and impliedly approved by this Court in *Kawakita* v. *United States*, 343 U.S. 717, 744, affirming 190 F. 2d 506, 521 (see Brief for Petitioner, No. 570, Oct. Term, 1951, pp. 160-169). And see *Huffman* v. *United States*, 297 F. 2d 754 (C.A. 5), certiorari denied, 370 U.S. 955, involving a closely similar charge.

It seems clear, moreover, that the court's reference to the possible expensiveness of a new trial—the feature of the instruction which petitioner finds objectionable (Pet. 9)—did not significantly influence the jury. Rather, the normal presumption "that the verdict returned was the result of honest and conscientious agreement of twelve minds" (*Kawakita* v. *United States*, *supra*, 190 F. 2d at 528) was buttressed by the fact that the jury, though finding petitioner guilty on one count and not guilty on two others, was unable to reach agreement on the remaining nine counts of the indictment.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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